

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2001-493-S - ORDER NO. 2002-556

JULY 30, 2002

IN RE: S.C. Department of Health and Environmental Control,)	ORDER GRANTING
)	MOTION TO DISMISS
)	COMPLAINT
Complainant/Petitioner,)	
)	
vs.)	
)	
United Utility Companies, Inc.,)	
)	
Defendant/Respondent.)	
_____)	

INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on a Motion to Dismiss filed by United Utility Companies, Inc. ("UUC"). On December 7, 2001, the South Carolina Department of Health and Environmental Control ("SC DHEC") filed a Complaint with the Commission requesting that the Commission review certain aspects of the tariff of UUC. UUC was served with the Complaint by the Commission's Executive Director, and UUC filed an Answer to the Complaint and a Motion to Dismiss. Thereafter, SC DHEC filed a Return to Motion to Dismiss, and UUC responded by filing a Reply to Return to Motion to Dismiss. The Motion to Dismiss is now before the Commission for consideration.

By its Complaint, SC DHEC requests that the Commission examine the pass-through provision of UUC's tariff and further requests that the Commission either strike the pass-through provision or amend the pass-through provision to allow UUC to recover pass-through costs of treatment in a manner which is consistent with the Clean Water Act, the Pollution Control Act, and area-wide waste treatment plans. The pass-through provision contained in UUC's tariff was approved by the Commission in Order No. 90-651, Docket No. 89-602-W/S, (July 16, 1990). The pass-through provision of which SC DHEC complains provides

2. Charge for Sewerage Collection Service Only

When sewerage is collected by [UUC] and transferred to a government body or agency, or other entity for treatment, ... [UUC] will also charge for treatment services provided by the government body or agency or other entity. The rates imposed or charged by the government body or agency or other entity providing treatment will be charged to [UUC's] affected customers on a pro rata basis, without markup.

By its Complaint, SC DHEC takes the position that the above-quoted tariff provision, allowing a pass-through of treatment services when such treatment services are provided by an entity other than UUC, allows UUC to recover costs for treatment in a manner that is substantially different from the mechanism by which UUC is allowed to recover costs of capital improvements. Upon information and belief, SC DHEC asserts that UUC has sought and obtained a uniform statewide rate for sewerage collection and treatment and that UUC can recover costs of capital investments for construction or expansion of one of its individual systems by an adjustment to UUC's uniform statewide tariff. SC DHEC asserts that by isolating the burden of pass-through treatment costs to

customers of only one of UUC's systems results in potential rate shock to UUC's present customers.

SC DHEC further asserts that the Commission, upon evaluation of prospective rate shock has denied approval of proposed interconnection proposals. *Cf.* Carolina Water Service, Inc. Docket No. 2000-511-W/S, Order No. 2001-360 (April 27, 2001). SC DHEC also asserts that denial of the interconnection proposals has in effect thwarted implementation of area-wide wastewater treatment plans established pursuant to Section 208 of the Federal Clean Water Act. SC DHEC cites to S.C. Code Ann. Section 58-3-300 (1976) which authorizes the Commission, when considering a correction of improper rates, to "consider all facts which in its judgment have a bearing upon a proper determination of the question, although not set forth in the complaint or application and not within the allegations contained therein."

SC DHEC acknowledges that the relief that it seeks will affect present customers of UUC who may be potentially affected by impact fees and treatment charges which UUC will pass-through if connection to a regional facility is approved. SC DHEC asserts that customers of UUC could appeal the approval of a proposed interconnection to a regional sewer plan. However, SC DHEC then contends that an appeal which results in denial of the interconnection fails to consider all relevant factors and fails to balance the Commission's responsibility to ensure a return fair to company and customer with the equally legitimate interests embodied in the area-wide wastewater treatment plans required by the Clean Water Act.

By its Motion to Dismiss, UUC asserts five separate grounds for dismissal of SC DHEC's Complaint. The grounds for dismissal asserted by UUC are 1) lack of standing, 2) laches, 3) lack of case or controversy/mootness, 4) lack of notice, and 5) collateral estoppel/issue preclusion.

DISCUSSION

Upon consideration of SC DHEC's Complaint, UUC's Motion to Dismiss, SC DHEC's Return, and UUC's Reply to Return, the Commission finds that UUC's Motion to Dismiss should be granted. In granting UUC's Motion to Dismiss, the Commission finds that SC DHEC lacks standing to bring its Complaint and further finds that there is no case or controversy present upon which the Complaint may stand.

S.C. Code Ann. Section 58-5-270 (1976) provides in relevant part that

complaints may be made by any corporation, public or private, person, chamber of commerce or board of trade, by any civic, commercial, mercantile, traffic, agricultural or manufacturing association or by any body politic, commission, board or municipal corporation by petition or complaint in writing, setting forth any act or thing done, or omitted to be done, with respect to which, under the provisions of Articles 1, 3 and 5 of this chapter, the Commission has jurisdiction or is alleged to have jurisdiction.

Thus S.C. Code Ann. Section 58-5-270 (1976) provides a listing of which entities or persons have standing to bring a complaint before the Commission. SC DHEC does not have the statutory standing to file a complaint under S.C. Code Ann. Section 58-5-270 (1976) as SC DHEC does not "fit" in any category of complainant listed in the statute. The term "person," as used in § 58-5-270 is defined in § 58-5-10(2). SC DHEC neither meets the definition of person as contained in § 58-5-10(2) which defines "person" as "an

individual, a firm and a copartnership” nor meets any of the other classes of entities which may file a complaint under S.C. Code Ann. Section 58-5-270 (1976).

Further, SC DHEC’s Complaint appears to complain, not about any action of UUC, but about a grievance that SC DHEC has with the Commission. It appears that SC DHEC is complaining about the Commission’s decision to include a provision permitting the “pass-through” of bulk service charges in UUC’s rate schedule. Therefore, S.C. Code Ann. Section 58-5-270 (1976) does not apply to SC DHEC’s Complaint as the Complaint does not address any action or omission of UUC.

However, even if SC DHEC’s Complaint could be viewed as a complaint as to the reasonableness of rates or charges, S.C. Code Ann. Section 58-5-270 (1976) allows the Commission the discretion of whether to entertain such a complaint. (“... But the Commission may at its discretion refuse to entertain a complaint as to the reasonableness of any rates or charges unless it be signed by the mayor or president or chairman of the board of trustees or a majority of the council, commission or other legislative body of the city or county or city or town affected by subject matter of such complaint or by not less than twenty-five consumers of the public utility named in the complaint. ...” S.C. Code Ann. Section 58-5-270 (1976)) Clearly, under S.C. Code Ann. Section 58-5-270 (1976), the Commission has the discretion whether to hear a complaint as to the reasonableness of rates or charges if a certain group files a complaint. And just as clearly, SC DHEC does not fall within the statutory “complainants” described in S.C. Code Ann. Section 58-5-270 (1976) authorized to file a complaint upon which the Commission could exercise the discretion to hear.

Additionally, the Commission finds that the Motion to Dismiss should be granted because there is no case or controversy present. SC DHEC's allegations of rate shock present no case or controversy as no interconnection has been identified and the alleged harm is purely speculative.

In its Reply, SC DHEC asserts that unless UUC proposes to amend the provision of its tariff with which SC DHEC takes issue, then the impact of the "pass-through" provision is capable of repetition yet evading review, and review by the Commission, in such circumstances, is appropriate. The Commission finds that SC DHEC's assertion of "repetition yet evading review" to be without merit. Under the Commission's Rules and Regulations, agreements between utilities and bulk service providers are subject to Commission review and approval. See, 26 S.C. Code Regs. 103-541 (Supp. 2001). Thus, if and when UUC seeks approval of an interconnection agreement, SC DHEC may intervene. Thus, an interconnection agreement will not evade review by the Commission, and the Commission concludes that SC DHEC's argument of capable of repetition yet evading review does not require the Commission to hear SC DHEC's Complaint.

CONCLUSION

Based on the foregoing reasons, the Commission grants the Motion to Dismiss filed by UUC.

IT IS THEREFORE ORDERED THAT:

1. The Motion to Dismiss filed by UUC seeking dismissal of the Complaint filed by SC DHEC is granted based upon lack of standing by SC DHEC and failure of the Complaint to present a case or controversy.

JULY 30, 2002

PAGE 7

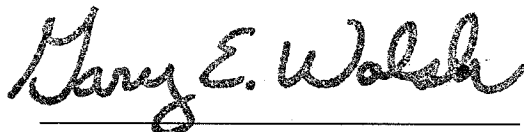
2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Mignon L. Clyburn, Chairman

ATTEST:



Gary E. Walsh, Executive Director

(SEAL)